U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 17 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesaler and distributor of watches. It seeks to employ the beneficiary permanently in the United States as an administrative purchasing manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (the DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess either a master's degree or a baccalauereate degree from an accredited U.S. institution as required on the ETA Form 9089.

On appeal, counsel asserts that the original ETA Form 9089 was filled out in error at Part H, Question 9, where the petitioner's former counsel erroneously indicated that a foreign educational equivalent to the required master's degree or baccalaueraeate degree from an accredited U.S. institution was not acceptable for employment in the offered job. Counsel contends that the error was harmless and the decision reached by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of HealthAmerica*, 2006-PER-1, (July 18, 2006) (en banc), held that denials due to inadvertent, harmless errors may be inappropriate. Counsel submits a letter from the petitioner's president in support of his assertion that an error was made by the petitioner's former counsel in completing the Part H, Question 9 of the ETA Form 9089 where he indicated that a foreign educational equivalent to the required master's degree or baccalauereate degree from an accredited U.S. institution was not acceptable for employment in the offered job.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

A review of the record reveals that the beneficiary successfully completed an undergraduate program at Sungkyunkwan University in Seoul, Korea, on February 25, 1987, resulting in a Bachelor of Science in Mechanical Engineering. The issue in the instant case is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Relying in part on *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, at 1309 (9th Cir. 1984).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015; *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, Question 4, of the labor certification reflects that a master's degree in business administration is the minimum level of education required. Part H, Question 7, reflects that no alternate field of study would be accepted. The petitioner noted in response to Part H, Question 8, that an alternate combination or education and experience would be acceptable. This alternate level of education is described in response to Question 8-A as "other" and, in 8-B, the petitioner indicates that it required a "BA/BS. plus 5 yrs of progressive exp or any suitable combination of edu[.]" In response to Question 8-C, the petitioner noted that applicants needed 5 years of work experience to fulfill the alternate combination of education and work experience indicated in Part H, Question 8. Question 9 reflects that a foreign educational equivalent is not acceptable.

Counsel contends that the decision reached by BALCA in *Matter of HealthAmerica*, 2006-PER-1, where it was held that denials of the labor certification due to inadvertent, harmless errors may be inappropriate was applicable in the instant case. However, the decision in *Matter of HealthAmerica* can be readily distinguished because that decision involved a labor certification that had been denied by the DOL, while in the instant case the ETA Form 9089 and the requirements contained therein had already been accepted for processing and approved by the DOL. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See, e.g. Madany*. Furthermore, a BALCA decision is not binding in these proceedings even if it were pertinent. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding in the administration of the Act, BALCA precedents are not similarly binding. *See* 8 C.F.R. § 103.9(a).

Furthermore, the benficiary's degree is in the wrong field. The beneficiary earned a degree in mechanical engineering. The ETA Form 9089 requires a degree in business administration, and the petitioner specifically noted that a degree in an alternate field of study was not acceptable.

The beneficiary does not meet the job requirements on the labor certification. Specifically, the beneficiary possesses a degree from Sungkyunkwan University in Seoul, Korea in mechanical engineering, but the petitioner indicated on the original ETA From 9089 that a foreign educational equivalent to either the required master's degree or baccalauereate degree from an accredited U.S. institution was not acceptable for employment in the offered job. The petitioner also required a business administration degree. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.